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# Selective Service Act - Armed Services - Reopening I-S(C) Classification

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the husband is powerless to compel her to do so. In view of the one paragraph opinion in *Malcolm*, the Supreme Court does not agree.

It is submitted that the decision rendered in this case may prove to be unworkable and that it results in an inequity to the husband in a community property state. Perhaps the Louisiana Code is the source of inequity with its provision for renunciation by a wife, but none for a husband (although, as discussed above, Section 2410 of the Code is open to an interpretation other than the unjust one applied here).

One wonders whether the Court of Appeals would have been so willing to allow the taxpayer to escape liability if it had been the husband who sought to renounce his community interest and thereby have all the income assessed to his wife. In a time when the law is ever more watchful of women's rights under the guise of "women's lib," perhaps it should also consider declaring unconstitutional such archaic laws as Section 2410 of the Louisiana Code, or courts should at least avoid interpretations of laws which will afford special privileges to women merely because they are women. After all, equality is a double-edged sword; we must be careful that women be equal to men, but also careful that they aren't made, by decisions such as this, *more* equal than men.

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SELECTIVE SERVICE ACT—ARMED SERVICES—REOPENING I-S(C) CLASSIFICATION—While not enrolled at a university, plaintiff was ordered to report for induction. Prior to the date of his scheduled induction, he voluntarily enrolled at a university, notified his local draft board of his new student status, and requested to be reclassified from I-A to I-S(c). The local board refused to reopen his classification stating that the facts presented were not sufficient to qualify him for a I-S(c) deferment since they did not show that he was satisfactorily pursuing a full-time course of instruction on the date of receipt of his induction order. Thereafter, plaintiff sought an injunction from the United States District Court, to enjoin the local board from inducting him.

In declining jurisdiction and at the same time deciding the merits of the case the court held that the failure of the local board to reopen plaintiff's I-A classification when informed of his new status was not "blatantly lawless"[1] because the board

1. 50 U.S.C.A. App. § 460(b)(3) (1967) states: "No judicial review shall be made

is not obligated by the regulations to reopen unless facts are presented which show that the registrant was pursuing a full-time course of instruction at the same time that he received his order to report.[2] *Peller v. Selective Service Local Board No.* 65, 313 F. Supp. 100 (N.D. Indiana 1970).

The court in the instant case, while rejecting arguments offered by plaintiff as to the literal meaning of the relevant sections of the Selective Service Regulations, based the denial of mandatory reopening on its understanding of the fundamental purpose of the I-S (c) deferment. The court stated that a contrary finding would result in an undue administrative burden on the Selective Service System because it would put a premium on stalling tactics and increase the chances for fraud on the part of the registrant.[3] More specifically, the court stated that the I-S (c) deferment is basically a relief measure and the regulation should not be interpreted in such a manner as to provide relief where the student has put himself in the detrimental position he is in.[4]

The statute and regulations which bear upon the question raised by the instant case (i.e. Must the local board reopen the classification of a student who, after he has received his order to report for induction, voluntarily enrolls in a full-time course of instruction at a unversity?) are primarily four in number. They are the Military Selective Service Act of 1967[5] and Sections 1622.15 (b), 1625.3 (b), and 1625.2 of the Selective Service Regulations. Section 1622.15 (b) states:

> In Class I-S shall be placed any registrant who while satisfactorily pursuing a full-time course of instruction at a college, . . . is ordered to report for induction, . . .[6]

Section 1625.3 (b) states:

> The local board shall reopen . . . the classification of a registrant to whom it has mailed an Order to Report for Induction . . . *whenever* facts are presented to the local board which establish the registrant's eligibility for classifi-

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of the classification or processing of any registrant by local boards, . . ." and it would, on its face, seem to preclude any judicial review of classification of registrants. However, the U.S. Supreme Court in *Oestereich v. Selective Service System Local Board No.* 11, 393 U.S. 233 (1968), held that despite the broad language of the statute, preinduction review is proper in extreme cases where the conduct of the local board is "blatantly lawless" or constitutes a clear departure from statutory mandate. From this holding it is clear that the question of the District Court's jurisdiction is decided concurrently with the merits of the plaintiff's claim of misconduct on the part of the local board.

2. Peller v. Selective Service Local Board No. 65, 313 F. Supp. 100 (N.D. Ind. 1970).
3. *Id.* at 104.
4. *Id.*
5. Selective Service Act of 1967, 50 U.S.C.A. App. § 456(1)(2).
6. 32 C.F.R. § 1622.15(b) (1967), hereafter referred to as § 15(b).
7. 32 C.F.R. § 1625.3(b) (1963), hereafter referred to as § 3(b).

> cation into Class I-S *because* he is satisfactorily pursuing a full time course of instruction . . . . (emphasis supplied).[7]

Section 1625.2 states:

> . . . the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.[8]

When interpreting these sections, great weight should be given to the construction consistently applied to a statue by the Executive Department with its administrative regulations; such construction not being overturned unless a different construction is plainly required.[9] Also, the relevant sections of the regulations must be read as a whole, yet the independent meaning of each section should be maintained[10] and the courts should rarely go behind the terms of the sections to define the motive for their enactment.[11]

Interpretation of the Regulations by the U. S. District Courts has led to two contrary results.[12] One interpretation has led to the result reached in the instant case, while the other has led to a finding that the local board must reopen the classification of the registrant and thus automatically cancel the outstanding induction order. In *McLain v. Local Board No. 47*,[13] the U.S. District Court ruled that a registrant's classification must be reopened when the local board is informed of the fact that the registrant is enrolled in school.[14] Thus the court disregarded the fact that the registrant enrolled after he received his order to report for induction.

In light of these two contrary decisions by the Federal Courts, it appears that a final resolution of the question will entail a more thorough analysis of the Regulations and a search for compelling policies which bear upon the question.

A discussion of the literal meaning of the Military Selective Service Act 456 (i) (2) and its counterpart, section 15(b) of the Regulations, does not appear to be decisive of the question as

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8. 32 C.F.R. § 1625.2 (1955), hereafter referred to as § 2.

9. United States v. Jackson, 280 U.S. 183, 193 (1930), *citing* United States v. Crecedo Hermanos y Compania, 209 U.S. 337 (1908); United States v. Johnson, 124 U.S. 236, 353 (1888).

10. NLRB v. Servette, Inc., 377 U.S. 46, 54 (1964).

11. United States v. Miller, 367 F.2d 72, 76 (2d Cir, 1966).

12. Peller v. Selective Service Local Board No. 65, 313 F. Supp. 100 (N.D. Ind. 1970); McLain v. Selective Service Local Board No. 47, Cir. No. 4492 (D.N.D., Dec. 12, 1969), *appeal docketed*, No. 20217, 8th Cir., March 23, 1970.

13. McLean v. Selective Service Local Board No. 47, Cir. No. 4492 (D.N.D., Dec. 12, 1969), *appeal docketed*, No. 20217, 8th Cir., March 23, 1970.

14. *Id.*

was demonstrated by the arguments presented in the instant case.[15] However, if section 15(b) is read in light of section 3(b), the meanings of both sections are somewhat clearer. Section 3(b) commands the local board to reopen *whenever* facts are presented which establish the registrant's eligibility for a I-S(c) classification *because* he is satisfactorily pursuing a full-time course of instruction (emphasis supplied).[16] Thus section 3(b) implies that a registrant becomes eligible for consideration for a I-S(c) classification by showing that he is enrolled in school without consideration of the question of the concurrency of his being enrolled and the receipt of his order to report. Therefore, section 3(b) appears to define a clearer and more inclusive prima facie case for purposes of reopening than does section 15(b).

Additional clarity in the meaning of the Regulations can be achieved by reading section 3(b) in conjunction with section 2. Section 2 gives the board the power to determine if new facts presented to it are sufficient to warrant a reopening. However, this section contains one exception to this broad power. It does not allow the board to reopen after it has sent an induction order to a registrant unless the new facts presented arose from circumstances over which the registrant had no control.[17] It appears then that section 2 would have been sufficient in itself to accomplish the result reached in the instant case (i.e. a denial of reopening because the new facts arose from circumstances over which the registrant had control) and any further sections such as section 3(b) which deals with reopening in I-S(c) cases would be unnecessary. Consequently, the reason for inclusion of section 3(b) in the Regulations comes into question since it appears to be superfluous when given the interpretation of the instant case. However, this finding seems to be contrary to generally used rules of statutory construction discussed above. It would therefore appear to be more logically sound to conclude that section 3(b) was included to act as an exception to the broad direction given to the board in reopenings by section 2.[18] This exceptional rule appears to command a reopening whenever facts are presented which show that a registrant is enrolled in school, regardless of the fact that this enrollment resulted from circumstances over which the registrant had control.

This analysis indicates that a contrary interpretation of section 3(b) should have been made by the court in the instant case.

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15. Plaintiff introduced an interpretation of § 1622.15(b) which has been accepted by the U.S. District Court in *Walsh v. Selective Service Local Board No.* 10, 305 F. Supp. 1274 (S.D.N.Y. 1969) and this was rejected by the court in the instant case at 104.
16. United States v. Dale, 304 F. Supp. 1278, 1282 (D.N.H. 1969).
17. United States v. Rundle, 413 F.2d 329, 333-34 (8th Cir. 1969).
18. *See* United States v. Rundle, 413 F.2d 329 (8th Cir. 1969).

However, before this interpretation should be accepted, it is felt that any supposedly compelling policies which bear upon the interpretation should be discussed to determine if the letter of the statute as interpreted by the author is compatible with its spirit.

The policies which have been noted by the advocates of the "narrow"[19] interpretation of the instant case have basically been two in number. First, it has been urged that the I-S(c) deferment was created only to provide relief for a student who during the school year receives an order to report for induction, having had no opportunity to plan for the unexpected interruption, thus obviating the hardship and waste which such an interruption causes.[20] Second, it has been urged that a "broad" interpretation will impose a severe administrative burden on the Selective Service System because it would create a premium on stalling tactics, cause an unmanageable increase in postponement requests, and increase the possibilities for fraud on the part of the registrant.[21]

The first policy can be conceded as one of the motivating factors in the enactment of section 3(b). It is felt, however, that this motive was not the only one existing and therefore is not itself sufficiently compelling to require a "narrow" interpretation. Rather, a more compelling and comprehensive motive caused the System to enact section 3(b). Through this section, the System attempted to counteract the hardships which would be imposed upon the registrant by the System itself.

The System offers various procedures by which an induction order may be reviewed or postponed,[22] all of which involve the administrative machinery of the System. Many of these procedures often require the expenditure of many months of valuable time which could be constructively used by the qualified student.[23] Recognizing this high probability of a wasting of resources, the System provided relief in section 3(b) by eliminating the necessity of a student's remaining uselessly idle while his legal rights are being exercised.

It is clear then that the System did not intend to penalize a student who voluntarily enters school while legitimately exercising his rights. Rather, it intended to prevent the interruption of the school year without considering whether the student reasonably

19. The interpretation of the instant case is labeled "narrow" because it would essentially result in fewer mandatory reopenings pursuant to § 1625.3(b) than would the "broad" interpretation given to the section by the court in *McLain*.

20. Peller v. Selective Service Local Board No. 65, 313 F. Supp. 100, 104 (N.D. Ind. 1970); Brief for Appellant at 12; McLain v. Selective Service Local Board No. 47, Cir. No. 4492 (D.N.D. Dec. 12, 1969), *appeal docketed*, No. 20217, 8th Cir., March 23, 1970.

21. Peller v. Selective Service Local Board No. 65, 313 F. Supp. 100, 104 (N.D. Ind. 1970).

22. *See* 32 C.F.R. § 1625.3(b) (1963).

23. The instant case shows how the procedures for review and postponement of induction orders may involve the expenditure of many months of time. In *Peller* the plaintiff received his initial order to report for induction on July 15, 1969, and was not finally ordered to report until February 5, 1970 at 101, 102.

knew that he would be ordered to report for induction after enrollment. The insignificance of this knowledge becomes more obvious in light of the recently enacted "lottery"[24] system for determining order of induction.

If, in fact, the System had intended to deny a reopening when it found that the student reasonably knew of the probability of being inducted after enrolling, then would it not follow that a student who holds a lottery number of 160 and enrolls in September after is has been made clear that his number will be called in September is also not entitled to a reopening? It would appear the System did not intend such a result by initiating the "lottery" and equally apparent that it did not intend to base the reopening under section 3(b) on such untenable grounds as the student's knowledge of his imminent induction since this would result in an arbitrary and irrational granting of I-S(c) deferments.

It is also urged that a "broad" interpretation would result in an increased possibility for fraud on the part of the registrant. However, as was suggested by the court in *U.S. v. Dale*,[25] the Regulations contain sufficient safeguards against the fraudulent activities of registrants to protect the System from the less than honest plotting of a few registrants. In addition, it is stated that a "broad" interpretation of section 3(b) would impose an undue administrative burden on the System by placing a premium on stalling tactics and causing a radical and unmanageable increase in postponement requests.[26] However, this position also seems unpersuasive.

Less than .05 percent of the registrants in the system hold I-S(c) deferments.[27] Thus it is felt by the author that a many fold increase in the number of people attempting to secure a I-S(c) as a result of the "broad" interpretation would still result in an insignificant number of applications which could be easily handled by the existing administrative machinery of the System. This conclusion is supported by the fact that the System itself provided many procedures of review and postponement and thus must have established sufficient machinery to absorb the impact of their utilization, regardless of the fact that much of this machinery may not now be in use.

Advocates of the "broad" interpretation of section 3(b) also urge that the universities have a legitimate interest in the "broad" interpretation since it would prevent *any* disruption of the school year and thus not adversely affect the smooth operation of the

24. The operation of the lottery system is explained in Local Board Memorandum No. 99, Nov. 26, 1969; SSLR 2200:8.
25. United States v. Dale, 304 F. Supp. 1278, 1283 (D.N.H. 1969).
26. Peller v. Local Board No. 65, 313 F. Supp. 100, 104 (N.D. Ind. 1970).
27. National Advisory Commission, Report on Selective Service, at 152-53 (1967).

school.[28] However, this position is at least as unconvincing as that which foretells of the unbearable administrative burden on the System. Clearly, the number of people at each institution which would be affected by the "narrow" interpretation of the instant case would not be significantly greater than the number affected by the "broad" interpretation.

This survey of the supposedly compelling policies appears to yield but one conclusion. The Selective Service System in enacting section 3(b) intended to prevent waste of time and disruption of the school year caused by the System itself, whether the student enrolled with or without the knowledge of his forthcoming induction. It balanced its interests in maintaining an orderly and efficient procedure for marshalling available manpower[29] against the waste and hardship imposed upon the student-registrant and struck what is felt to be a proper balance which should not be upset by the courts.

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28. Brief for appellee at n. 21, McLain v. Selective Service Local Board No. 65, Cir. No. 4492 (D.N.D., Dec. 12, 1969), *appeal docketed*, No. 20217, 8th Cir., March 23, 1970.

29. *See* United States v. Nugent, 346 U.S. 1 (1953).